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SUPREME COURT OF TENNESSEE

OCTOBER TERM, 1943

No. 356

JILLO BYNUM, ET AL.,

Petitioners,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

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THE FIRESTONE TIRE & RUBBER COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

This action presents to your Honors a federal question of importance and not heretofore determined by this Honorable Court, viz: The applicability and scope of the exemption contained in Section 213 (a) (2) of the Federal Statute,

The Fair Labor Standards Act of 1938 (29 U. S. C. A., Section 201, et seq.), which is as follows:

> "The provisions of section 206 and 207 shall not apply with respect to (2) any employee engaged in any *retail or service* establishment the greater part of whose selling or servicing is in intrastate commerce * * *"

An authoritative and elucidating decision by this Honorable Court interpreting and construing the above section of the said Act is of great importance to the business world and the legal profession.

Petitioners pray this Court to review on writ of certiorari a judgment of the Court of Appeals of Tennessee and the Supreme Court of Tennessee, in the case there entitled *Jillo Bynum, Robert Mullins and Lonnie Lewis* v. *The Firestone Tire & Rubber Company.*

A final judgment of the Supreme Court of Tennessee was rendered on May 15, 1943, when the petitioners' petition for a writ of certiorari from that court to the Tennessee Court of Appeals was denied (R. 222).

The petitioners, former employees of the respondent, working out of and for one of the respondent's Firestone Auto Supply & Service Stores, which are the sole outlets and channels for goods, wares and merchandise manufactured and processed by the respondent, outside the state of Tennessee and in the state of Tennessee, brought this action under the Federal Statute, The Fair Labor Standards Act of 1938, in the Chancery Court of Shelby County, Tennessee, to recover minimum wages, overtime compensation and other benefits provided by said Act (R. 1; 12).

The issues joined by the pleadings filed by the parties hereto were:

(1) Were petitioners, as employees of the respondent, working out of and for its particular Firestone Auto Supply

& Service Store, engaged in interstate activities within the contemplation of the said Act?

(2) Was the respondent's particular Firestone Auto Supply & Service Store, for and out of which the petitioners worked, a *retail or service* establishment the greater part of whose selling or servicing was in intrastate commerce entitling respondent to the exemption contained in Section 213 (a) (2) of the Act?

(3) Were petitioners, as employees of the respondent, working out of and for its particular Firestone Auto Supply and Service Store, engaged in a bona fide retailing capacity under Section 213 (a) (1) of said Act entitling respondent to exemption from the liability imposed by Sections 206 and 207 of the Act?

The Chancellor, trying the cause upon oral testimony and without the intervention of a jury, held, adjudged and decreed (1) that the petitioners' activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act (R. 32), but that the particular Firestone Auto Supply & Service Store of the respondent involved in this cause was a retail establishment under Section 213 (a) (2) and that, therefore, Sections 206 and 207 of said Act did not apply to the petitioners (R. 34). The Chancellor dismissed petitioners' action (R. 35).

The Chancellor declined to make a specific determination of issue (3) set out above (R. 44).

From so much of the Chancellor's decree as adjudged that the petitioners were employees of a retail establishment under Section 213 (a) (2) of the Act, petitioners perfected a limited appeal to the Court of Appeals of Tennessee (R. 46).

From so much of the Chancellor's decree as adjudged that the petitioners' activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce under the said Act and from so much of the decree as failed to adjudge that the petitioners were employees engaged in a bona fide local retailing capacity, respondent perfected a limited appeal to the Court of Appeals of Tennessee (R. 47).

The Court of Appeals of Tennessee, on January 22, 1943, rendered its opinion and judgment, affirming the holding and judgment of the Chancellor adjudging that the respondent's particular Firestone Auto Supply & Service Store involved in this case was a retail establishment under Section 213 (a) (2) of the Act (R. 196).

The issues presented to the Court of Appeals by the respondent's appeal were not considered by that court and were thus pretermitted (R. 195).

The opinion and decree of the Court of Appeals appear in the record (R. 191, 196), and are not yet published.

Petitioners within proper time filed their petition for writ of certiorari in the Supreme Court of Tennessee and assigned errors on the part of the Court of Appeals, raising the issue whether the respondent's particular Firestone Auto Supply & Service Store was a retail establishment contemplated by Section 213 (a) (2) of the Act (R. 196, 218 et seq).

Respondent filed its petition for a writ of certiorari in the Supreme Court, assigning error on the part of the Court of Appeals in failing to consider and in pretermitting the issues presented in that court by respondent's assignments of errors (R. 233).

The petitions for writs of certiorari by the petitioners and respondent were both denied by the Supreme Court of Tennessee, without opinions (R. 222), May 15, 1943.

The petitions for certiorari being denied by the Supreme Court, the record was not transmitted to that court and is now lodged in the Court of Appeals of Tennessee. The Clerk of the Supreme Court and the Clerk of the Court of Appeals for the Western Division of Tennessee is the same person, the Hon. J. E. Springbett (22 Tenn. App. Rep. 5, 175 Tenn. 6). However, petitioners pray for certiorari to both courts so a technicality could not successfully be interposed that might defeat justice.

Summary Statement of the Matter Involved.

The respondent, The Firestone Tire & Rubber Company, of Ohio, is engaged in that state in the manufacture of automotive and vehicular tires, tubes, accessories and equipment and in the manufacture of sundry and various other commodities and products. In addition, goods, wares and merchandise, such as radios, frigidaires, heaters, bicycles and various other commodities are manufactured by independent manufacturers at the specific orders and contracts with respondent and at the designs and requirements of the respondent (R. 6).

In Shelby County, Tennessee, respondent operates and maintains a subsidiary, The Firestone Tire & Rubber Company, of Tennessee. The said subsidiary is engaged in Tennessee solely in the manufacturing and processing of automotive and vehicular tires, tubes, accessories and equipment and in the manufacture and processing of various other commodities and products (R. 23).

Respondent ships its wares, goods and merchandise, manufactured and processed at its plant in Ohio, and in its plants in other states, and goods, wares and merchandise manufactured for it by independent manufacturers, in interstate commerce to its subsidiary plant in Shelby County, Tennessee (R. 7).

With the manufacturing of goods, wares and merchandise produced by the respondent at its plant in Ohio and at its subsidiary plant in Shelby County, Tennessee, in the sense of developing or producing finished commodities from raw materials the petitioners have no connection and this cause is in no way predicated upon such premises. The Firestone Tire & Rubber Company of Tennessee is not a party to this litigation, but only the parent organization, The Firestone Tire & Rubber Company of Ohio.

Respondent operates and maintains only one source for the disposal of its goods, wares and merchandise to the public, namely, certain outlets or channels known as the Firestone Auto Supply & Service Stores, which respondent owns and operates throughout the country (R. 23, 95).

In Memphis, Shelby County, Tennessee, on the corner of Washington & Third streets, in said city, county and State, respondent operates, maintains and owns one of its said Firestone Auto Supply & Service Stores. This is the particular Firestone Auto Supply & Service Store involved in this cause and this action is based upon a consideration of the business of this store and the work of the petitioners performed as employees of the respondent working out of and for this particular store. This action is grounded upon a consideration of the said store as a *unit* and not in connection with any other activities of the respondent. The activities of the petitioners are considered only with relation to the work which they performed solely as employees of the respondent working out of and for this particular store. Said store is not engaged in manufacturing or processing any merchandise, but engaged only in the *selling and servicing* of the goods and merchandise which is manufactured and processed by the respondent at its plant in Ohio, in respondent's other plants outside of Tennessee and at its subsidiary in Shelby County, Tennessee and the goods

manufactured outside of Tennessee by independent manufacturers for the Firestone interests (R. 7, 23, 95).

As heretofore stated the first issue formed by the pleadings herein was whether the petitioners, as employees of the respondent working out of and for its said store, were engaged in the production of goods for interstate commerce and in interstate commerce within the purview of the said Act.

Pleadings (R. 1, 12).

Petitioners' Duties.

In performing the principal function of their duties the petitioners at the express order and direction of their superiors loaded truck, automobile, bus and tractor tires and tubes, other automotive accessories and parts, and other commodities, onto trucks at the said store for shipment, distribution and transportation into the States of Arkansas and Mississippi. That they, and each of them, delivered large quantities of truck and bus tires and tubes, etc. to the owners and operators of fleets of trucks and buses engaged in the interstate transportation of passengers and freight and that they, and each of them, mounted said tires and tubes onto the buses, trucks and trailers used in the transportation of interstate commerce. Petitioners, and each of them continually and regularly serviced the truck, trailer and bus tires so delivered and mounted by them on said vehicles. Petitioners were directed to, and did from time to time, deliver from the said store and from the plants owned and operated by the Firestone interests in Shelby County, Tennessee, and upon delivery mounted, large truck and tractor tires and tubes on automotive and vehicular machinery and tractors which automotive and vehicular machinery so equipped were offered for sale, sold, transferred and distributed in interstate commerce. Petitioners, and each of them, delivered orders of tires and tubes, auto-

mobile parts and accessories and other goods to dealers who resold the merchandise. Each of the petitioners at the order and direction of their superiors made deliveries of large quantities of truck tires and tubes from said store and, when so directed, directly from respondent's said subsidiary, to large commercial users thereof, a substantial portion of whom were engaged in interstate commerce and in the production of goods for interstate commerce. Truck and tractor tires and tubes so delivered were mounted by petitioners and were by them regularly serviced. Petitioners handled for retreading and recapping tires which were received in interstate commerce from outside the State of Tennessee, and those received from patrons of said store intrastate, by taking them from said store to the Firestone plant in Shelby County, Tennessee, or to independent retreaders, when the molds at the said Firestone plant were not large enough to accommodate said tires, and picking up from said plant or independent retreaders said tires after being processed or recapped, etc. and shipped same in interstate commerce to the out of state patrons, or mounted such tires on the buses, trucks, trailers, and vehicles of the patrons of said store in Tennessee (R. 48-58, 62, 63-64, 67-68, 69, 70, 71, 86).

Petitioners performed sundry other duties which it is not necessary to detail.

On this issue, regarding a consideration of whether the activities of the petitioners were within the purview of the Act defining *interstate commerce* and in the *production of goods for interstate commerce,* the Trial Court held and adjudged that the petitioners' (complainants') activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act (R. 32).

The Trial Court passed on no other feature of the petitioners' duties.

The holding and judgment of the Trial Court that the petitioners were engaged in commerce within the purview of the Act was sustained by the Court of Appeals, when that court declined to consider this issue and pretermitted the question of whether petitioners were engaged in commerce within the Act, which question was raised in the court of Appeals of Tennessee by the assignments of errors filed in that court by the respondent (R. 195, 227).

The Supreme Court of Tennessee, in effect, adopted the holding and adjudication of the Trial court, and of the Court of Appeals, when it denied the respondent's petition for a writ of certiorari to review this issue, decided in favor of the petitioners, which issue was properly raised in the Supreme Court by the assignments of errors in the petition of respondent (R. 222, 234 et seq.).

The issue of whether the petitioners' activities brought them within the protection of the beneficient Fair Labor Standards Act of 1938, having been decided in their favor, it is not necessary to state further facts concerning the work of the petitioners.

The second issue in this action was raised by the affirmative defense plead by the respondent, to-wit: that its said store was a retail or service establishment the greater part of whose selling or servicing was in intrastate commerce, all within Section 213 (a) (2) of said Act (R. 5, 22).

The Chancellor held and adjudged that the respondent's said store was a retail establishment rendering service incidental to the conduct of the business of said establishment, the greater part of whose selling or servicing was in intrastate commerce within Section 213 (a) (2) of said Act and that, therefore, Sections 206 and 207 of the Act (29 U. S. C. A., Sections 206-207) were not applicable to the

petitioners. The Chancellor accordingly dismissed petitioners' suit (R. 35).

On January 22, 1943, the Court of Appeals of Tennessee, to which court petitioners had perfected a limited appeal on the issue of whether respondent's said store was such as contemplated by Section 213 (a) (2) of the Act, overruled the petitioners' assignments of errors filed in that court raising this issue and affirmed the judgment or decree of the Chancery Court holding that the respondent's said establishment was within the purview of section 213 (a) (2) of the Act (R. 196).

On May 15, 1943, the Supreme Court of Tennessee, in effect, adopted and approved the judgments and decrees of the Chancery Court and the Court of Appeals, when it denied the petition of the petitioners' for a writ of certiorari to review the judgment of the Court of Appeals holding respondent's said store was within the purview of Section 213 (a) (2) of the Act. Proper assignments of errors were filed in the Supreme Court of Tennessee raising the issue in that court (R. 222).

Business of Said Store.

In support of its defense under Section 213 (a) (2) of the Act, respondent introduced in evidence and made a part of the record in this cause certain analyses made of the said store's business by the auditor of the respondent's Firestone Auto Supply & Service Stores. The auditor, Mr. John Ford Laumer, testified as a witness for the respondent and all of the analyses, designated as Exhibits were made a part of the record by the testimony of Mr. Laumer. The procedures employed by the auditor in compiling the Schedules, or Exhibits, will be set forth in the brief filed in this cause by the petitioners in support of the petition for writ of certiorari (R. 114 et seq.).

Exhibit #1 (Schedule "A") (R. 150, 114)

Exhibit #1 to the record shows the *wholesale and non-retail sales* and the retail sales of the said store, to-wit:

October 24, 1938–December 31, 1939

Total Sales	Wholesale	Retail	% Wholesale	% Retail
$73,404	$28,588	$44,816	39.1	60.9
		For the Year 1939		
$369,306	$129,234	$240,072	34.0	66.0
		For the Year 1940		
$415,412	$149,449	$265,963	35.95	64.05

Exhibit #2 (Schedule "D")
(R. 151, 114).

	10/24/38 12/31/38	1/ 1/39 6/30/39	7/ 1/39 12/31/39	1/ 1/40 6/30/40	7/ 1/40 12/31/40
Total Sales	$73,404	$150,333	$218,973	$201,100	$215,312
Total Non-Retail Sales.	14,770	23,718	54,333	48,662	43,265
Retail Sales	58,634	126,615	164,640	152,438	172,047
% of Total Sales	79.7	84.0	75.2	75.7	80.0
% Non-Retail	20.3	16.0	24.8	24.2	20.0

		Total Sales
Total for Entire Period	859,122	
Non-Retail	184,748	
Retail Sales	674,374	
% of Total Retail Sales		78.4
% Total Non-Retail		21.6

Exhibit #5 (Schedule "G")
(R. 152, 114)

	10/24/38–9/20/40
Total Sales per Operating Statement	$716,715
Total Interstate Sales	17,013
Total Intrastate Sales	699,702
% Intrastate Sales	97.8
	96.7

Exhibit #7 (R. 153, 115)

Respondent's witness-auditor testified that he picked at random two months' business of said store, July, 1939 and December, 1940, as indicative of the usual and average number of wholesale and retail transactions handled by it. July 1939 is within the period of controversy, December, 1940 is not.

For the month of July, 1939 the wholesale transactions handled by said store constituted 25.2% of the entire charge

transactions handled it, the cash sales not being considered. Each sales ticket represented a transaction and the sale may have been for one article or for a hundred (R. 107, 136).

Features of the Business of Said Store.

1. Respondent's said store solicited business and sold indiscriminately in wholesale and retail transactions (R. 60-62, 63, 65-66, 67, 79, 91, 94, 146, 50, 54, 56 and Exhibits 1, 2, 5 and 7.

(a) From Oct. 24, 1938 through December 31, 1938, said store earned *39.1%* of its total income from its wholesale business, from this source of business in the year 1939 said store derived *34%* of its total income and for the year 1940 said store obtained *35.95%* of its entire income from this type of business. The wholesale business of said store was a regular, usual and integral part of its entire unsegregated business, interstate and intrastate. See Exhibit #1, based on a quantity-price test and explained in the brief hereto (R. 150, 50, 51, 60, 62, 63, 68, 91 and 57, 70-72, 80-81, 94, 143).

(b) From Oct. 24, 1938 through December 31, 1938, said store obtained from strictly technical wholesale transactions, *i. e.* goods sold to dealers for resale, *20.3%* of its entire income; in the year 1939, said store from this type of business obtained *20.4%* of its entire income and for the year 1940, said store obtained *22.1%* of its entire income from this kind of business. Business to dealers was handled in interstate and intrastate transactions and as a regular and usual part of its business. See Exhibit #2 (R. 151) based on an analysis of sales for resale and sales made for consumption. (Explained in brief hereto.) (R. 60-62, 63, 65-66, 67, 79, 91, 94, 146.)

(c) Exhibit #7 to record, p. 153, shows that, on an average, *25.2%* of the number of transactions handled by said store are of a wholesale character, or one out of every

four deals is a wholesale sale. Each sales ticket represented a transaction and the sale may have been for one unit or a hundred (R. 136).

2. Said store, in its usual and regular business, and as a customary practice, handled goods demanded only by an industrial and commercial market, such as road builders' tires, tires for industrial machinery and equipment, farm combines, etc. (R. 51, 54, 56-57, 61-62, 63, 66-67, 69-70, 71, 77, 87).

3. Said store as a regular and customary part of its business sold gasoline in large quantities, at a discount from the retail price thereof, to dealers, for resale, and to large consumers thereof. The bulk and tank wagon sales were made by said store but delivered by an employee of another Firestone Auto & Supply Store (R. 101, 138, 187, 188). In addition to the bulk and tank wagon sales and deliveries of gasoline handled as above stated, said store, through its own employees, from the pumps on the premises of said store, sold gasoline in large quantities, and on contracts, filling the trucks of operators who owned and maintained fleets of trucks, by furnishing gas for such trucks daily or as needed, said gasoline being sold at a discount from the retail price and most of the gasoline so pumped from the premises of said store being consumed for the operation of vehicles engaged in interstate commerce (R. 138, 187, 188, 60-61, 78).

4. Merchandise sold by said store, such as tires and tubes, to large consumers of such articles were regularly serviced by its service system and "sales" of such service were made to the large utilizers of its service at a discount from the retail price of similar service performed for the individual (R. 135, 148).

5. For the sole purpose of soliciting, and selling to, dealers and in large quantities to large consumers of its

goods, said store maintained in its employ for such business, interstate and intrastate, three regular, and sometimes four, *commercial salesmen.* Said store furnished automobiles to such salesmen for their soliciting accommodation and work. Said salesmen did not work on the premises of said store, but solicited business and made sales away from the premises of said store, interstate and intrastate; other employees of said store made sales on the premises of said store (R. 61, 63, 68, 78, 91, 92.)

6. *Each* and *every article* handled and sold by said store carried a list of *three* prices, dealers', commercial and consumer's. Salesbooks containing all the articles handled and sold by said store and the three prices on each of said article were furnished by said store to its employees (R. 62, 75, 87, 91).

7. Said store maintained two types of billing, dealers and consumers. Sales in large quantities, at discounts, made to large consumers of its merchandise, were billed on the dealers statements (R. 61, 74, 76-77).

8. To meet competition by other manufacturers of similar products as manufactured by respondent's interests, and sold and serviced by its said store, said store made sales of its merchandise to large consumers and industrial, commercial and governmental accounts, at *even less than the dealers' prices* (R. 61, 63, 76, 91, 143).

9. A concerted and extensive scheme for selling its goods and to meet competition was mapped for said store by the respondent's Sales Manager of its Southern District. *All employees* of the said store, except the colored help, were required to solicit orders for, and to sell its goods. Each employee was assigned a monthly "quota" which he was required to meet, sell and fill. To spur on the sales activities of said store, each and every employee's progress in the

monthly sales endeavors and the amount of the current sales were posted *daily* on charts displayed at said store. The data on the charts showed the retail (goods sold to dealers to be retailed), commercial and consumer's business (R. 61, 63, 73, 75, 76, 78, 84-85, 86, 95.

10. All employees of said store, colored help excepted, were required to attend the sales meetings, district meetings, campaigns, conferences, etc., all supervised by the respondent's Sales Manager for its Southern District (R. 95).

11. Said store handled, as shown on Exhibits #1 and #2, merchandise termed by respondent "Sales Value of Deliveries". This represented the value of merchandise drawn from the stock of said store to fill the orders and contracts made by the respondent from its home office in Ohio with national organizations to meet the needs of said organizations vehicular requirements, and to fill orders from Firestone Auto Supply & Service Stores, outside of Tennessee, or their patrons; during the period from Oct. 24, 1938 through December 31, 1940, the total amount of these "Sales Value of Deliveries" amounted to $29,797. The sales were not made by the store, but as stated, by the respondent, and drawn from stock of said store and delivered or shipped by said store through its delivery system. The merchandise so drawn from the stock of said store was replaced in said store by respondent's District Office and said store was given a "commission" on these transactions in place of the "sales credit" which it received for sales made directly by it (R. 96, 121).

12. Said store regularly distributed and furnished a catalog containing a list of its commodities and articles and on which articles were given in said catalog the retail and wholesale prices (R. 62).

13. The stock of said store was one commingled mass, from which indiscriminately were drawn the orders for its intrastate, interstate, wholesale and retail business. The entire business of said store was operated under one roof, in one building, without physical separation of its various activities and types of business, and as one integral and combined unit. The work of its employees, except for the *commercial salesmen*, was indiscriminately and interchangeably utilized in its retail, wholesale, interstate and intrastate business (R. 50, 51, 60, 62, 63, 68, 91, 96).

14. Said store occupied a building which is one-fourth of a city block square in dimensions and it employed regularly about 30 employees, seven of whom were colored men, (R. 62). Of the seven colored men, only the petitioners drove trucks intrastate and performed business and work away from the said store, during the respective periods of their employment (R. 52, 54, 62, 63, 68, 92, 58).

PERIODS OF TIME FOR WHICH PETITIONERS EMPLOYED.

Petitioner Jillo Bynum was employed by respondent from October 24, 1938 to October 24, 1939, Lonnie Lewis from Oct. 23, 1938 to April 30, 1939, and Robert Mullins from June 26, 1939 to September 22, 1940 (R. 28, 29). Petitioners each worked 12 hours each weekday every week during their respective employment periods, with no time off for lunch, and worked 12 hours on every other Sunday (R. 32, 43-44, 49, 53, 55, 62, 65, 86). Petitioners were each paid $50 per month (R. 29).

Jurisdiction of This Court

Jurisdiction of this court is based upon Sec. 237 of the Judicial Code, as amended by the Act of Feb. 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of vari-

ous states where "a title, right, privilege or immunity is set forth or claimed under a statute of the United States".

In this case, a title, privilege, right and immunity was set forth in the pleadings filed herein by the petitioners in the Chancery Court of Shelby County, Tennessee, seeking to recover benefits provided by The Fair Labor Standards Act of 1938, (29 U. S. C. A., Sec. 201 et seq.) (R. 1, 12).

The Chancery Court of Shelby County, Tennessee, failed to sustain and preserve the title, right, privilege and immunity claimed by the petitioners in this cause under the said Federal statute when it erroneously adjudged and decreed that the respondent's store involved herein was a *retail establishment* within the scope of Section 213 (a) (2) of said statute and dismissed petitioners' action (R. 34).

The Court of Appeals of Tennessee failed to sustain and preserve the right, title, privilege and immunity provided by said Federal statute for the benefit of the petitioners, when that court overruled the petitioners assignments of errors filed therein charging the Chancery Court had erred in adjudging the respondent's said store was a *retail establishment* under Section 213 (a) (2) and affirmed the Chancery Court (R. 195, 196).

The Supreme Court of Tennessee, failed to sustain and preserve the right, title, privilege and immunity claimed by petitioners under said Federal statute when that court on May 15, 1943, denied the petitioners' petition for a writ of certiorari to review the judgment or decree of the Court of Appeals' adjudging that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of the Fair Labor Standards Act of 1938, and, in effect, overruled the petitioners' assignments of errors filed in that court charging error on part of the court of appeals in holding said store within the scope of a *retail establishment* as set out in Section 213 (a) (2) (R. 222, 218 et seq.).

The right, title, privilege and immunity claimed by the petitioners under the provisions of the Statute of the United States upon which this action is predicated, namely, The Fair Labor Standards Act of 1938, (29 U. S. C. A., Sec. 201 et seq.), is determinative of the issue herein. The errors of the Supreme Court of Tennessee, the Court of Appeals of Tennessee and the Chancery Court of Shelby County, Tennessee, are fundamental and their decisions in this cause rest on no non-Federal grounds but solely upon a construction or interpretation of Section 213 (a) (2) of said Statute, which matter is the sole and determinative issue involved.

The action of the Supreme Court of Tennessee in denying, on May 15, 1943, the petitioners' petition for a writ of certiorari is a final judgment or decree rendered by the highest court of the state of Tennessee in which a decision could be had. The Supreme Court of Tennessee is the "highest court of that state" as set forth in Art. VI, Sec. 1, of the Const. of Tennessee of 1870.

Specification of Errors on the Question Presented.

There is but one question presented in this cause for consideration by this Honorable Court, to-wit:

Is the *retail or service establishment* under Section 213 (a) (2) of 29 U. S. C. A., The Fair Labor Standards Act of 1938, limited and restricted to a firm or business engaged almost exclusively in making retail sales, or does the *retail establishment* under said Section cover with a mantle of protection a corporation or firm engaged in a combined, unsegregated, regular, usual and substantial retail *and wholesale* business, and doing a substantial business in interstate commerce?

Your petitioners submit that the Court of Appeals and the Supreme Court of Tennessee were each in error in the following respects:

1. The Court of Appeals and the Supreme Court of Tennessee erred in holding and adjudging that the respondent's store involved herein was a *retail establishment* under Section 213 (a) (2) of said Act because the *undisputed* evidence, introduced by respondent in its Exhibit #1 and made a part of the record in this cause, shows that from October 24, 1938 through December 31, 1938, the wholesale business of the said store amounted to *39.1%* of its entire income; in 1939 the said store derived *34%* of its total income from its wholesale business and in 1940 the wholesale business of said store amounted to *35.95%*, and that said store was substantially engaged in interstate commerce (Exhibit #5, R. 152).

2. The Court of Appeals and the Supreme Court of Tennessee erred in sustaining and affirming the Trial Court's decision that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of said Act, because the record shows that the Trial Court and, therefore, the Court of Appeals and the Supreme Court of Tennessee, applied an erroneous interpretation to Section 213 (a) (2), refused or failed to follow the decision of the Court in *Wood* v. *Central Sand & Gravel* (2 L C. 18,642;), making a "substantial" participation in wholesale or non-retail business the test to be used in construing "retail establishment" under said section and elected to follow the 50% wholesale and 50% retail criterion set forth in Bulletin #6 (Retail and Service Establishments) of the Wage & Hour Division of the Department of Labor, published *December 1938,* which theory the Administrator of the Wage & Hour Division *repudiated,* after the decision in the *Woods* case, supra, and set up a *75%* retail and *25%* wholesale as the degrees of participation in the two types of business, in its Revised Bull. #6 of *June 1941* (R. 33, 37, 43).

3. The Court of Appeals and the Supreme Court of Tennessee erred in holding that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of said Act as the *undisputed* evidence introduced by the respondent by its Exhibit #7 discloses that in July 1939, which month was picked at random by the respondent's auditor as indicative of the number of wholesale transactions handled by respondent's said store during the course of a month, disclosed that *25.2%* of the total number of transactions were wholesale in character, or one in every four sales made by said store was a wholesale sale (R. 160).

4. The Court of Appeals and the Supreme Court of Tennessee erred in holding that the respondent's said store was a retail establishment under Section 213 (a) (2) of said Act as the record shows that the said store was engaged in a combined wholesale and retail business, and doing part of its business in interstate commerce; that there was no physical separation in the types of business carried on by it, nor in the records maintained by it; that the stock of merchandise of the said store was a commingled mass from which was drawn the merchandise, indiscriminately, to fill the wholesale orders, the retail sales, the interstate transactions and the intrastate business; that the work of its employees was utilized indiscriminately by the said store and the petitioners handled interstate and intratstate business and wholesale and retail transactions of said store (R. 50, 51, 60, 62, 63, 68, 91, 96).

Reasons Relied On for Granting the Writ.

It is submitted that this Court should entertain jurisdiction of this cause for the following reasons:

(1) The issue here presented is a federal question of substance not heretofore determined by this Court, to-wit,

the interpretation of Section 213 (a) (2) of The Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, et seq.).

(2) An authoritative and elucidating decision by this Court construing Section 213 (a) (2) of said Act is of great importance to the business world, to the legal profession and to the judiciary.

(3) The decisions of the Courts of Tennessee in this cause, applying the exemption contained in Section 213 (a) (2) to the respondent's store involved herein, were not predicated upon federal judicial decisions construing said section, and which had been announced at the time the judgments herein were rendered, and which decisions it was the duty of the state courts of Tennessee to follow, but based upon the theory advanced by a public official, the Administrator of the Wage & Hour Division of the U. S. Department of Labor, which theory was by the Administrator later *repudiated* as being erroneous and which official, the Administrator of the Wage & Hour Division, was not empowered by said Fair Labor Standards Act of 1938 (1) to restrict or extend the scope of Section 213 (a) (2) nor (2) to impose legally binding interpretations as to its meaning.

The Honorable Court in the case of *Wood* v. *Central Sand & Gravel*, 33 Fed. Supp. 40 (2 Lab. Cas. 18, 642) in considering the application of Section 213 (a) (2) of the Act to the defendants in that case, held:

> "Conceding that the defendant • • • makes many retail sales; yet, if it also does a *substantial wholesale* business, its business taken as a whole should not be considered a 'retail establishment' within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938."

In the case at bar, the Courts of Tennessee refused to follow the ruling of Judge Martin, as set forth in the Wood case, supra; and, in sustaining the Trial Court, adopted the erroneous theory which had been advanced by the Administrator of the Wage & Hour Division of the U. S. Department of Labor, prior to the decision in the *Wood* case, supra.

The decision in the cause at bar which denied the right, privilege, and title claimed by the petitioners to recover benefits under the Fair Labor Standards Act of 1938, stems from the following opinion rendered by the Trial Court (R. 37):

> "Judge Martin, in the Wood *v.* Central Sand and Gravel case, says that a *substantial* part of the business of that company was *wholesale*, and therefore the Act applied. Well, the Administrator, up to July 1941, says that *fifty percent* is the determinative point, and that Wood *v.* Sand & Gravel case was decided while that idea was being promulgated by the Administrator. And then the Administrator changes it and makes it 75 and 25 percent.
>
> So, try as you may, you cannot follow all of these rulings of the Administrator. So, as I say, I think that while this store * * * has done—intentionally and pointedly—has done some business with dealers, and that they have made some large sales to truck lines and so on, that considering the set-up, as an entity, and the fact that the *percentage* as it stands in the record here *complies with the rulings of the Administrator made in the respective bulletins, then I think that in fairness that they should be said to be a retail establishment.*"

The Court of Appeals of Tennessee and the Supreme Court of Tennessee, ignored and rejected the construction and interpretation of Section 213 (a) (2) of this Act of

Congress, the Fair Labor Standards Act of 1938, announced and established by the federal court in the *Wood* v. *Central Sand & Gravel* case, and which construction has been followed consistently by other courts, and committed material error by adopting the erroneous theory of a mere official, who *repudiated* the very basis upon which this right, privilege and title of the petitioners was decided by the courts of Tennessee. The petitioners' right, privilege, title and immunity claimed under the salutary Fair Labor Standards Act of 1938, was not preserved, sustained and considered by the Court of Appeals and the Supreme Court of Tennessee in harmony with and in accordance with the law in this cause. It is, respectfully submitted that this cause should be reviewed by this Court.

Your petitioners present herewith as a part of this petition a certified copy of the transcript of the record in the Court of Appeals and the Supreme Court of Tennessee and present their brief for consideration with the petition discussing the question involved.

Wherefore, your petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directly to the Court of Appeals and the Supreme Court of Tennessee, commanding said courts to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the cause in said courts styled, *Jillo Bynum, Robert Mullins and Lonnie Lewis* v. *The Firestone Tire & Rubber Company, Shelby Equity,* to the end that said cause may be reviewed and determined by this Court and that the petitioners may have such relief as this Court may deem proper and equitable and that the opinion and judgments or decrees of the Court of Appeals and Supreme Court of Tennessee, sustaining and affirming the Chancery Court of Shelby County, Tennessee, may be

reversed and judgment entered in this cause in favor of the petitioners for all equitities to which they may be entitled.

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